APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JULY 30, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-51064

TEXAS DEMOCRATIC PARTY; BOYD L RICHIE, in his capacity as Chairman of the Texas Democratic Party

Plaintiffs-Appellants

v.

ROGER WILLIAMS, in his capacity as Secretary of State for the State of Texas

Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas
USDC No. 1:07-CV-115

Before JOLLY, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Appendix A

We have reviewed the briefs, pertinent portions of the record, and the applicable law and have heard the arguments of counsel. We find no reversible error in the district court's grant of summary judgment, especially in the light of the Supreme Court's recent decision in *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008), which confirms that the district court appropriately applied the balancing test of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), to the constitutional claims raised. The summary judgment is AFFIRMED, essentially for the reasons given by the district court in its well-considered opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION DATED AND FILED AUGUST 16, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Case No. A-07-CA-115-SS

TEXAS DEMOCRATIC PARTY and
BOYD L. RICHIE, in his capacity as
Chairman of the Texas Democratic Party,

Plaintiffs,

-vs-

ROGER WILLIAMS, in his capacity as
Secretary of State for the State of Texas,

Defendant.

ORDER

BE IT REMEMBERED on the 10th day of August 2007, the Court called the above-styled cause for a hearing and the parties appeared through counsel. Before the Court were Defendant Roger Williams's Motion for Summary Judgment [#4], Plaintiffs' Response thereto [#26, 27], and Defendant's Reply thereto [#35]. Having considered the motion, the response, and the reply, the arguments of counsel at the hearing, the relevant law, and the case file as a whole, the Court enters the following opinion and order.

Appendix B

Background

Plaintiffs have sued claiming that the eSlate voting systems, manufactured by Hart Intercivic and first certified for use in Texas elections in the year 2000, do not allow voters to "emphasize" their votes when voting a straight party ticket, which causes no votes to be recorded in a race when a voter chooses to vote a straight party ticket and also to "emphasize vote" for a candidate of the same party.[1] According to Plaintiffs, "emphasis voting" occurs when a voter selects the straight party option, and then continues down the ballot to select one or more of his chosen party's individual candidates. These voters, Plaintiffs allege, "do not have complete confidence that their straight-party vote will give a vote to every party candidate." Orig. Compl. at 2, ¶4. Plaintiffs allege these voters want to "make sure" their votes count for these candidates, and that the practice is "not unusual, especially among elderly voters or where voters are distrustful of the voting system or of the election officials." *Id.* at 2, ¶5. They argue that by emphasis voting, the voter has made his or her choice clear.

Plaintiffs complain that the eSlate voting systems do not allow emphasis voting because when a voter chooses the straight party ticket, and then manually

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1. The Court is somewhat puzzled by the motivation behind "emphasis voting," given that who a person votes for is privileged and private information. Thus, "emphasis voters" are really only emphasizing their fervor or lack of fervor for a particular candidate to a machine or a piece of paper.

selects the same party's candidate in an individual race, the voting machine de-selects[2] the voter's choice in the individual race and records no vote in that race. Plaintiffs claim this de-selection process fails to record a voter's intent in instances where the voter has made his or her intent especially clear.

Defendant and Plaintiffs do not disagree regarding how the eSlate voting machines work. When a voter begins the voting process, the first screen he or she is shown contains the straight party choice. Def.'s Mot. Summ. J., Ex. 1 at 1; *see also* Ex. 7. The instructions for straight party voting read as follows: "To cast a straight-party vote, choose the option to the left of the name of that party. Selecting a party automatically selects all candidates associated with that party. If you select a candidate associated with a party other than the straight-party selection, your vote for that candidate will be counted in that particular contest." *Id.*, Ex. 1 at 2. The eSlate machines record straight party votes in the following way: A voter who wishes to utilize the straight party option scrolls down to his or her party choice. *Id.* at 3. After pressing enter, the box beside the party choice, for example, the Democratic Party, is marked in red. *Id* at 4. At the same time, all of the races

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2. Choosing the straight party option automatically highlights and selects the party's candidate in all races in which the party has a candidate on the ballot. When an emphasis voter clicks on a party candidate's name in a particular race, this click de-selects and removes the color highlighting from that candidate's name, leaving no candidate selected. *See* Def.'s Mot. Summ. J., Exs. 1, 3.

in which there is a Democratic candidate on the ballot are also marked in red. *Id.* at 4-9. The voter can therefore see by scrolling down the ballot that all of the Democratic Party choices have been automatically marked in red and selected.

When a voter scrolls down to an individual race, such as the race for U.S. Senator shown on page 4 of Exhibit 1, the voter's choice of the Democratic candidate in that particular race is already marked and the name of the Democratic Party candidate is displayed in red. *Id.* at 13. If at this point the voter decides to vote again for the already-selected Democratic Party candidate, the voter's pressing of the enter button will de-select the choice. Before the eSlate voting machine will allow a voter to deselect a straight party candidate, it warns the voter that he is making a change to a straight party choice by displaying a warning screen. *Id.*, Ex. 2. That screen says, "Be aware that you are changing a straight-party choice." *Id.*[3] When the voter proceeds past this warning, the screen then displays, for example, the U.S. Senator's race and shows that the voter now has made no selection in the race because the red mark beside the Democratic candidate's name is no longer there and the Democratic candidate's name is no longer in red. *Id.*, Ex. 3. The voter at this time has an opportunity to re-select the Democratic candidate or any other candidate for the race. Finally, before casting the vote,

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3. Before the hearing Plaintiffs had contested that such a warning screen in fact appeared; however, Plaintiffs' counsel conceded to the existence of the warning screen during the hearing.

the voter is shown a screen summarizing his or her choices. On that screen, beside the race for U.S. Senator, the message, "No selections," is written in red. *Id.*, Ex. 4. The Ballot Summary Page states at the top "To change a vote, highlight the contest to change and press ENTER." *Id.*

Plaintiffs seek a declaratory judgment and injunctive relief to enforce rights guaranteed under the Fourteenth Amendment under section 1983. Orig. Compl. at 4. Specifically, Plaintiffs claim the eSlate voting machines burden the fundamental right to vote under the Due Process Clause of the Fourteenth Amendment to the United States Constitution by de-selecting votes lawfully cast for particular candidates. *Id.* at 10. Plaintiffs also claim the voting machines burden the fundamental right to vote under the Equal Protection Clause of the Fourteenth Amendment because the machines treat voter selections differently than other voting systems throughout the state. Finally, Plaintiffs claim the eSlate voting machines violate the Texas Election Code and the Help America Vote Act.

Appendix B

Analysis

I. Summary Judgment Standard

Summary judgment may be granted if the moving party shows there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding summary judgment, the Court construes all facts and inferences in the light most favorable to the nonmoving party. *Richter v. Merchs. Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir. 1996). The standard for determining whether to grant summary judgment "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990).

Both parties bear burdens of production in the summary judgment process. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The moving party has the initial burden of showing there is no genuine issue of any material fact and judgment should be entered as a matter of law. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 322-23; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The nonmoving party must then come forward with competent evidentiary materials establishing a genuine fact issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Anderson*, 477 U.S. at 256-57; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

However, "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-movant's burden." *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996).

II. Defendant's Motion for Summary Judgment

Defendant moves for summary judgment claiming Plaintiffs have failed to demonstrate any violation of the United States Constitution, the Texas Election Code, or the Help America Vote Act.

A. Due Process and Equal Protection

Plaintiffs allege their access to the ballot is impacted by the eSlate's process of de-selecting votes. They claim that this process violates due process by disenfranchising voters, and that the voting system violates equal protection because there are no uniform rules to determine intent where a voter chooses to emphasize individual candidate selections after casting a straight party vote.

The right to vote in both state and federal elections is protected by the Federal Constitution. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Gamza v. Aguirre*, 619 F.2d 449, 452 (5th Cir. 1980). The constitutional protections afforded the right to vote do not end the moment the ballot is cast; they continue, to ensure the vote is tallied accurately after it has been cast. *Reynolds*, 377 U.S. at 554.

Appendix B

The Court evaluates Plaintiffs' claims under the *Anderson* and *Burdick* framework. *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564 (1982); *Burdick v. Takashi*, 504 U.S. 428, 112 S.Ct. 245 (1992); *see Wexler v. Anderson*, 452 F.3d 1226, 1232-33 (11th Cir. 2006) (analyzing challenge to use of touchscreen ballots lacking paper verification under "important regulatory interests" standard of *Burdick*); *Weber v. Shelley*, 347 F.3d 1101, 1105-06 (9th Cir. 2003) (analyzing challenge to lack of voter-verified paper trail in touchscreen voting system under equal protection and due process clauses under *Anderson* and *Burdick)*. The Court rejects Plaintiffs' argument that *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) requires the use of a different framework.[4]

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4. In *Bush v. Gore*, the Supreme Court specifically noted: "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109.

Plaintiffs claim *Bush v. Gore* implicitly requires strict scrutiny review; however, the Supreme Court explicitly states that a state cannot by "arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05. This does not clearly require the use of strict scrutiny and instead implies that rational basis review is the standard where a state uses differing rules for measuring the intent of voters on the same punch card technology. Even applying *Bush v. Gore* here, the Court finds the eSlate machines do not treat voters arbitrarily or disparately compared to Texas voters using other voting technologies.

Appendix B

In *Anderson v. Celebrezze*, the Supreme Court required that lower courts analyzing a ballot access case must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments. Then the courts must identify and evaluate the precise interests put forth by the state as justifications for the voting regulation. In making this evaluation, the court is to determine the legitimacy and strength of each of these interests and consider the extent to which these interests make it necessary to burden plaintiffs' rights. At that point, the court must weigh all factors. *Anderson* at 789, 103 S.Ct. at 1570.

In *Burdick v. Takushi*, the Supreme Court added that the rigorousness of the inquiry depends upon the extent of the burden on First and Fourteenth Amendment rights. When state statutes impose "severe" restrictions, the statute must be narrowly drawn to advance a compelling interest. However, when a state law imposes only "reasonable, nondiscriminatory restrictions" on those rights, the state's important regulatory interests are generally sufficient to uphold the statute. *Burdick*, 504 U.S. at 434. The Fifth Circuit recognized and applied this standard in *Texas Independent Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996). The Supreme Court explicitly rejected a standard under which every voting case would be subject to strict scrutiny: "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S.

at 433. "Election laws will invariably impose some burden upon individual voters." *Id.*

In applying the *Anderson-Burdick* analysis, one must first examine the extent to which a challenged provision burdens First and Fourteenth Amendment rights. Plaintiffs have alleged the eSlate voting system disenfranchises "emphasis voters" and that it treats voters in different Texas counties differently with respect to the tabulation of votes. Plaintiffs have offered voting records they claim show instances in which the eSlate system failed to record "emphasized" votes; however, a facial review of these records does not show the eSlate voting system impacts a voters' constitutional rights because it is impossible to know whether or not the voters intended to both vote a straight party ticket and to make no selection in certain races. *See* Orig. Compl., Ex. B. Plaintiffs seek to have this Court assume that anytime a voting record shows no selection beside a race in which the straight party selected has a candidate on the ballot that this resulted from a straight party voter attempting to emphasize his or her vote.[5]

The assumptions Plaintiffs are making are speculative to say the least. Reaching the conclusion that every time a straight party voter failed to make a

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5. There are certainly other possible explanations for this phenomenon, including that some straight party voters simply do not want to vote in every race, for example because they do not like any of the candidates in certain races, and de-selecting the party candidate is the most efficient and accurate way for them to achieve this result.

selection in a race involving one of that party's candidates indicates an attempt to emphasis vote requires the following: (1) an assumption that the voter did not see or did not understand the fact that all of his Democratic choices were automatically marked when he chose the straight party Democratic ticket option; (2) an assumption that the voter did not see or did not understand the screen that told him to be aware that he was changing a straight party choice; (3) an assumption that the voter did not understand that he had de-selected his party choice when he was shown the screen showing the individual race in which the Democratic candidate's box, that had been marked in red, was no longer marked in red; and (4) the assumption that the voter did not see or understand the summary screen, which told him that he had made no selection in the particular race(s) in which he attempted to emphasize his vote. *See* Def.'s Mot. Summ. J., Exs. 1-4. If a voter works his way through each of these warnings and still leaves a particular race with no selection, it is equally if not more plausible that the voter intended to make no selection for that race. The Court is not impressed by Plaintiffs' argument that the summary screen indicating that a straight party selection has been made and also indicating that no selection has been made for some or all races is so confusing or misleading as to violate voters' constitutional rights.

Assuming *arguendo* that the eSlate impacts the constitutional rights of "emphasis voters," any such impact is too slight to violate the Constitution under the *Anderson-Burdick* framework. The first step in this

analysis is to examine the extent to which the Texas statute allowing the certification of the eSlate voting system in 2000 burdens voters' First and Fourteenth Amendment rights. The Texas Election Code governs systems certified for use in Texas counties as a result of an approval process providing standards to be applied to all voting systems and giving the Secretary of State the ultimate authority to determine whether a particular voting system meets these standards. *See* Tex. Elec. Code §§ 122.001,[6] 122.031 *et seq.* All voting systems in

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6. This section, entitled "Voting system standards" provides as follows:

> (a) A voting system may not be used in an election unless the system:
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> (1) preserves the secrecy of the ballot;
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> (2) is suitable for the purpose for which it is intended;
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> (3) operates safely, efficiently, and accurately and complies with the error rate standards of the voting system standards adopted by the Federal Election Commission;
>
> (4) is safe from fraudulent or unauthorized manipulation;
>
> (5) permits voting on all offices and measures to be voted on at the election;
>
> (6) prevents counting votes on offices and measures on which the voter is not entitled to vote;
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> (7) prevents counting votes by the same voter for more than one candidate for the same office or, in elections in which a voter is entitled to vote for more than one candidate for the same office, prevents counting votes for more than the

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Texas must maintain these standards, but the standards allow for differences in the operation of systems for counties with differing needs. There is no requirement

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number of candidates for which the voter is entitled to vote;

(8) prevents counting a vote on the same office or measure more than once;

(9) permits write-in voting;

(10) is capable of permitting straight-party voting; and

(11) is capable of providing records from which the operation of the voting system may be audited.

(b) A voting system may not be used in an election in which straight-party voting is permitted unless the system permits or prevents, as applicable, counting votes in accordance with Sections 65.007(c) and (d).

(c) The secretary of state may prescribe additional standards for voting systems consistent with this title. The standards may apply to particular kinds of voting systems, to particular elements comprising a voting system, including operation procedures, or to voting systems generally.

(d) Effective January 1, 2006, a voting system may not be used in an election if the system uses:

(1) mechanical voting machines; or

(2) a punch-card ballot or similar form of tabulating card.

(e) For an election for federal office in which a state or federal court order has extended the time for voting beyond the time allowed by Subchapter B, Chapter 41, a voting system must provide a separate count of the votes cast after the time allowed by that subchapter.

Tex. Elec. Code § 122.001.

in Section 122.001 that voting systems record "emphasis votes" in any particular way, nor is there any Constitutionally guaranteed right to "emphasis vote." The only burden the eSlate machine arguably places on the First and Fourth Amendment rights of voters is to notice that the box beside his chosen candidate's name is marked in red after selecting the straight party ticket option. The machine warns the voter several times, as discussed above, should the voter seek to emphasize his straight party candidate by de-selecting that candidate. This burden is slight and requires only the amount of engagement necessary to read the computer screen in front of him.[7]

In a case such as this in which the burden on First and Fourteenth Amendment rights is slight, the state's important regulatory interests are generally sufficient to uphold the statute. *Burdick*, 504 U.S. at 434. "[S]tates are entitled to broad leeway in enacting reasonable, even-handed legislation to ensure that elections are carried out in a fair and orderly manner." *Weber*, 347

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7. It is hard to imagine the voter who is so unsophisticated that he cannot read the screen in front of him, cannot tell the difference between a color-highlighted box and an empty box, and does not read or cannot understand the several warnings provided by the eSlate system when he attempts to "emphasize vote" for a the straight-party candidate already selected. Would the election process be improved if whistles and bells and flashing lights were generated by the voting machine anytime a straight party choice was de-selected? A hypothetical voter using any type of voting system will always have problems voting in the context of a lawsuit filed by a political party for political purposes.

F.3d at 1105 (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)). "No balloting system is perfect. Traditional paper ballots, as became evident during the 2000 presidential election, are prone to overvotes, undervotes, 'hanging chads,' and other mechanical and human errors that may thwart voter intent." *Weber*, 347 F.3d at 1106 (citing *Bush v. Gore*, 531 U.S. 98 (2000)). Touchscreen voting systems like the eSlate remedy a number of these problems, albeit at the hypothetical price of susceptibility to not recording emphasis votes where a voter does not follow the directions of the machine and/or does not understand the warnings given by the machine when he attempts to emphasis vote for a candidate already selected. "The unfortunate reality is that the possibility of electoral fraud [and undervotes] can never be *completely* eliminated, no matter what type of ballot is used." *Weber*, 347 F.3d at 1106. "However, it is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems. So long as their choice is reasonable and neutral, it is free from judicial second-guessing." *Id.* at 1107.

Here, the Secretary of State of Texas made a reasonable, politically neutral,[8] and non-discriminatory choice to certify the eSlate voting machines for use in elections, and nothing in the Constitution forbids this choice. The standards delineated in Section 122.001 of

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8. Plaintiffs admit that the statistics they have at present establish that more Republican voters vote a straight party ticket and therefore more Republican voters are allegedly disenfranchised through emphasis voting than Democratic voters. *See* Pl.'s Response Summ. J. at 11.

the Election Code are reasonable, nondiscriminatory, and they do not impose any severe burden on voters who wish to emphasize their vote by allowing certification of the eSlate voting system. "Emphasis voters" have the same right as any voter to read the instructions in front of them and to follow them to ensure their intended vote is recorded. Plaintiffs have failed to allege a burden on their rights so severe as to violate the Constitution; therefore, the Court grants summary judgment in favor of Defendants.

Plaintiffs have brought forth no evidence to show the eSlate voting system violates the constitutional rights of emphasis voters. Plaintiffs have proffered the affidavits of three Madison County voters who voted on the eSlate and who state that they "emphasis voted." Pl.'s Response, Exs. B, C, D. All three voters attest they never saw any warning screen or sign; however, Plaintiffs' attorney conceded at the hearing that the eSlate machine does in fact generate the warning screen and on paper that the description of the system is assumed accurate. *Id.* at 6, Exs. B, C, D. Therefore, it is entirely unclear whether or not these voters actually claim their votes were de-selected and/or not properly counted because they selected the straight party choice and also emphasis voted. These affidavits are not evidence that any constitutional violation occurred because it is unclear whether or not the affiants de-selected their candidates of choice and/or did not have their intended selections counted. Plaintiffs have provided no evidence of a single voter who testifies that he was confused by the warning screens or the process

for selecting or de-selecting candidates. As explained above, there will always be certain voters whose intended votes are not counted by any voting method because the votes are not recorded properly or unambiguously by the voters themselves.

Plaintiffs also present the affidavit of Robert Parten, the former Tarrant County Election Administrator, who opines that emphasis voting occurs, and states "The eSlate's operation concerning straight-party and emphasis voters is likely to explain some or all of the undervote observed when comparing paper and eSlate voting systems." Pl.'s Response, Ex. A. However, Parten's opinions are inadmissible under Federal Rule of Evidence 702 because Parten has not collected data on undervotes or emphasis voters, his opinion is not the product of reliable principles and methods, and he has not applied any principles or methods to the facts of the case. See Fed. R. Civ. P. 702. Therefore, the Court places little, if any, importance on his opinions from the summary judgment evidence. Mr. Parten's unsupported statement simply does not tie undervotes to emphasis voters any more than to other possible explanations—e.g., a voter intentionally choosing not to vote in every race.

For the reasons set forth above, the Court finds there is no genuine issue of material fact with regard to any violation of the equal protection and due process rights of Texas voters based on the eSlate voting system's tabulation of "emphasis votes."

III. Texas Election Code and Help America Vote Act ("HAVA") Claims

The Court also finds as a matter of law that Plaintiffs are not entitled to relief on their claims of violations of Texas Election Code § 65.009 or 42 U.S.C. § 15481 (Section 301 of HAVA).

Conclusion

In accordance with the foregoing:

IT IS ORDERED that Defendant Roger Williams's Motion for Summary Judgment [#4] is GRANTED;

IT IS FURTHER ORDERED that Non-Party Dana DeBeauvoir's Motion to Quash and for Protection From Subpoena Duces Tecum [#22], Non-Party Diana Barrera's Motion to Quash and for Protection from Plaintiff's Notice of Deposition and Written Questions and Subpoena Duces Tecum [#25], and Plaintiffs' Motion to Compel [#32] are DISMISSED AS MOOT.

SIGNED this the 16th day of August 2007.

s/ Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT JUDGE